



## HUD Finalizes Changes to Disparate Impact Rule

The Department of Housing and Urban Development (HUD) has [finalized the rule](#) regarding how Disparate Impact cases are handled. HUD's stated purpose for proposing these changes is to conform the Disparate Impact rule to the Supreme Court ruling in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*. This case confirmed the possibility of liability under the Fair Housing Act for actions that have a disparate impact, and it also laid out some parameters about that liability. The new rule takes effect on October 26, 2020.

NARPM has been following this proposal closely, and we submitted a [comment letter](#) in support of the proposed new rule last year.

Under the current Disparate Impact Rule, the charging party/plaintiff brings a claim and is simply burdened with showing only that the practice in question caused or will predictably cause a discriminatory effect. Then, the burden of proof shifts to the respondent/defendant to show that the practice is necessary to achieve a legitimate, nondiscriminatory interest. If successful, the burden shifts back to the charging party/plaintiff to show that the interest of the respondent/defendant could be served by another practice that has a less discriminatory effect.

Here is an outline of the new rule:

- 1) The complaint must focus on a specific, identifiable practice.
- 2) The charging party/plaintiff must first establish a prima facie case by stating facts that plausibly allege the following five elements:
  - a) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;
  - b) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;
  - c) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class, meaning that the specific practice is the direct cause of the discriminatory effect;
  - d) That the alleged disparity caused by the policy or practice is significant; and
  - e) That there is a direct relation between the injury asserted and the injurious conduct alleged.
- 3) If the case is not resolved at this stage, then the burden is on the complaining party/plaintiff to prove by preponderance of the evidence the following elements that were used to establish a prima facie case:
  - a) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;

- b) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class, meaning that the specific practice is the direct cause of the discriminatory effect;
  - c) That the alleged disparity caused by the policy or practice is significant; and
  - d) That there is a direct relation between the injury asserted and the injurious conduct alleged.
- 4) A respondent/defendant may rebut a plaintiff's allegation that the challenged policy or practice is arbitrary, artificial, and unnecessary by producing evidence showing that the challenged policy or practice advances a valid interest (or interests) and is therefore not arbitrary, artificial, and unnecessary.
  - 5) If the respondent/defendant states that the practice in question is necessary to achieve a legitimate, nondiscriminatory interest, then the complaining party/plaintiff must prove by preponderance of the evidence either that the interest (or interests) advanced by the defendant are not valid or that the interest of the respondent/defendant could be served by another practice that has a less discriminatory effect, and that such alternative would serve the interest in an equally effective manner without imposing greater costs and burdens on the respondent/defendant.
  - 6) Under the new rule, the respondent/defendant can defend themselves at the pleading stage by showing that the defendant's policy or practice was reasonably necessary to comply with a third-party requirement, such as a:
    - a) Federal, state, or local law;
    - b) Binding or controlling court, arbitration, administrative order or opinion; or
    - c) Binding or controlling regulatory, administrative or government guidance or requirement.
  - 7) Under the new rule, the respondent/defendant can defend themselves after the pleading stage by showing the following:
    - a) The policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class, with respect to the allegations made in the prima facie. This is not an adequate defense, however, if the plaintiff demonstrates that an alternative, less discriminatory policy or practice would result in the same outcome of the policy or practice, without imposing materially greater costs on, or creating other material burdens for the defendant.
    - b) The plaintiff has failed to establish that a policy or practice has a discriminatory effect under the burden of proof as outlined in number 3 above.
    - c) The defendant's policy or practice is reasonably necessary to comply with a third party requirement, such as a:
      - i) Federal, state, or local law;
      - ii) Binding or controlling court, arbitration, administrative order or opinion; or
      - iii) Binding or controlling regulatory, administrative, or government guidance or requirement.
  - 8) The new rule states that remedies should be geared toward fixing the discriminatory practice and that HUD will seek compensatory damages where such are warranted, and will only seek penalties on top of compensatory damages in cases where the respondent/defendant has committed unlawful housing discrimination in the last 5 years in violation of the Fair Housing Act in a section other than disparate impact.

Based on our analysis, here are the key takeaways that distinguish the new rule from the old:

- The new rule clearly lays out all the elements that must be met when a charging party/plaintiff brings attempts to establish a prima facie case in the pleading stage. The charging party/plaintiff must establish facts that plausibly support the 5 elements in item 2 above. Then, if the case is not resolved, the charging party/plaintiff must prove the 4 elements in number 3 above. Under the old rule, all the charging party/plaintiff needed to do was show that the practice in question caused or will predictably cause a discriminatory effect, arguably a lesser and more vague standard.
- One item that is particularly remarkable is that if a respondent/defendant argues that the practice in question is for achieving a legitimate business interest, the complaining party/plaintiff must prove by preponderance of the evidence either that the interest (or interests) advanced by the defendant are not valid or that the interest of the respondent/defendant could be served by another practice that has a less discriminatory effect, and that such alternative would serve the interest in an equally effective manner ***without imposing greater costs and burdens on the respondent/defendant***. In the old rule, there was no requirement that the alternative practice advanced by the complaining party/plaintiff not impose a greater burden on the respondent/defendant.
- In addition, the new rule lays out specific defenses that can be raised by a respondent/defendant at both the pleading stage and after. To be sure, a number of property managers have wanted a simple list of dos and don'ts to follow. While the new rule does not contain that, the provision of positive defenses (in effect, safe harbors) provides some needed clarity for property managers and landlords to construct their policies with more certainty that those policies are in compliance with the rule.
- The rule also states that HUD is to focus remedies on fixing the problem, not punitive fines, except in cases of the worst offenders.

If you have any questions, please do not hesitate to contact NARPM® Governmental Affairs at [legislativeinfo@narpm.org](mailto:legislativeinfo@narpm.org).